

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. EP 712

IMPROVING REGULATION AND REGULATORY REVIEW

231647

**COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

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Dated: January 10, 2012

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Norfolk Southern Railway Company (“NS”) submits these Comments in response to the October 12, 2011 Notice (“Notice”) issued by the Surface Transportation Board (“Board” or “STB”) requesting public comment and participation in the Board’s retrospective review of its existing regulations. NS joins in the comments of the Association of American Railroads (“AAR”) and offers the following comments to supplement and support the AAR’s proposals.

INTRODUCTION

The Board has instituted this proceeding in response to President Obama’s direction to executive and independent agencies to perform a “retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.”¹ To facilitate this retrospective review, the Board seeks public comments that (1) identify any of the Board’s regulations that are “outmoded, ineffective, insufficient, or excessively burdensome”; (2)

¹ Executive Order 13563, 76 Fed. Reg. 3,821-23 (Jan. 31, 2011); Executive Order 13579, 76 Fed. Reg. 41,587-88 (July 14, 2011).

propose how those regulations should be “modified, streamlined, expanded, or repealed”; (3) present evidence of the costs and benefits of any proposed change; and (4) suggest the appropriate timeframe for the agency’s next retrospective review.²

As the Board indicated in its December 21, 2011 decision, the focus of this proceeding is “on whether there are long-standing regulations that have been shown to be obsolete or are otherwise in need of revision.”³ Accordingly, like the AAR, NS will limit the scope of its comments to exclude the pending and recently completed proceedings listed in the AAR’s November 17, 2011 Petition for Clarification.⁴ NS urges the Board to base any action taken in those dockets on the full and complete records that have been or will be developed in those topic-specific proceedings.

In general, the Board’s retrospective review should be governed by the Congressional objectives set forth in the Rail Transportation Policy, in particular: “to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required” and “to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of

² Notice at 2.

³ *Improving Regulation and Regulatory Review*, STB Docket No. EP 712 (STB served Dec. 21, 2011).

⁴ *Waybill Data Reporting for Toxic Inhalation Hazard*, EP 385 (Sub-No. 7); *Waybill Data Released in Three-Benchmark Rail Rate Proceedings*, EP 646 (Sub-No. 3); *Class I Railroad Accounting and Financial Reporting—Transportation of Hazardous Materials*, EP 681; *Solid Waste Rail Transfer Facilities*, EP 684; *Amtrak Emergency Routing Orders*, EP 697; *Assessment of Mediation and Arbitration Procedures*, EP 699; *National Trails System Act and Railroad Rights-of-Way*, EP 702; *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704; *Competition in the Railroad Industry*, EP 705; *Reporting Requirement for Positive Train Control Expenses and Investments*, EP 706; *Demurrage Liability*, EP 707; and *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, EP 711.

developing and maintaining the capability of providing such information.”⁵ Such objectives are consistent with President Obama’s direction for agencies to employ the “least burdensome tools for achieving regulatory ends.”⁶

Therefore, in response to the Board’s Notice, as clarified by its December 21, 2011 decision, NS respectfully submits the following list of suggestions, arranged by topic, to assist the Board in its efforts to revise and update its regulations in a manner consistent with the Rail Transportation Policy and the Board’s regulatory goals.⁷

RATE CASES

A. Presentation of Evidence

NS strongly endorses the AAR’s proposal asking the Board to abandon the current practice, established in Ex Parte No. 347 (Sub-No. 3), that allows parties to simply note the witness sponsoring each section of its narrative, as opposed to presenting factual evidence in the form of verified statements.⁸ In *Texas Municipal Power Agency*, the first stand-alone cost (“SAC”) case since the practice was implemented, BNSF forecasted the difficulty with this change when it “expresse[d] concern that the filing of only a narrative statement could make it

⁵ 49 U.S.C. § 10101(2) and (13).

⁶ Executive Order 13563, 76 Fed. Reg. 3,821, 3,821 (Jan. 31, 2011).

⁷ These comments are not intended to be construed as either a Petition for Rulemaking under 49 C.F.R. § 1110.2 or as a Petition for Exemption under 49 U.S.C. § 10502(b). To the extent the Board deems it appropriate to address the issues raised herein, the Board may begin the required proceeding(s) on its own initiative.

⁸ *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, STB Ex Parte No. 347 (Sub-No. 3) (STB served Mar. 12, 2001).

difficult to determine which witness is responsible for, and is sponsoring, which portion of the narrative.”⁹ While this critique has proven true, the problems are even more acute.

The current format undermines witness accountability by mixing together the arguments of counsel with the factual assertions of one or more witnesses. Indeed, when a witness generally sponsors a sweeping number of pages, it is difficult to discern if any verbal excesses contained in that section are those of the lawyer or of the witness. Moreover, under current practice, multiple witnesses often claim responsibility for some—or even all—of the same set of issues or facts, lessening accountability between and among witnesses.

By comparison, verified statements tend to be more carefully crafted and precise, as they are subject to the closer scrutiny of witnesses, who know that they must sign and attest, under oath, that the factual assertions are true and correct. In addition, the verified statement format makes clear which witness is attesting to which facts and therefore ensures accountability among witnesses. However, to the extent the Board has concerns that the verified statement format could lead to a single topic being dispersed among several witnesses,¹⁰ parties could be restricted to submitting one verified statement per topic, which would maintain the current benefit of having the filing arranged by subject matter. Because there can be no substitute for the restraint

⁹ *Texas Municipal Power Agency v. The Burlington Northern Santa Fe Ry. Co.*, STB Docket No. 42056, at 2 n.2 (STB served Feb. 6, 2002).

¹⁰ *See General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, STB Ex Parte No. 347 (Sub-No. 3), at 2 (STB served Mar. 12, 2001) (“Often several witnesses address the same issues and, because the evidentiary presentations have generally been organized by witness rather than issue, evidence on a particular topic has been dispersed throughout the record, making the evidence on a topic difficult to track, and thereby unnecessarily complicating the case.”).

and persuasiveness of a signed statement from a witness, the Board should require that any witness who is attesting to evidence provide a verified statement.

B. Discovery

NS respectfully requests that the Board impose meaningful limits on the discovery permitted in SAC cases. Over the years, while the list of discovery requests in SAC cases has been recycled and added to by complainants, few categories have been deleted, in spite of the fact that the documents produced in response to many of these requests are not even used by complainants. SAC discovery is costly, burdensome, and consumes substantial resources; there is no reason to add to that burden by requiring the collection of unnecessary information.

NS recently completed discovery in *E.I. du Pont de Nemours & Co. v. Norfolk Southern Railway Co.*, STB Docket No. NOR 42125. In that case, DuPont served nearly 800 total discovery requests (interrogatories, requests for production, and requests for admission), including subparts. NS began the discovery process trying to record exactly the number of people hours that were being consumed by the data retrieval process, but it had to abandon that effort as the time needed for discovery continued to escalate.

The Board should consider comparing the discovery requests in recent SAC cases with the evidence submitted in those cases to determine which categories of discovery are not used by complainants. The Board could then order that railroads do not have to produce such material absent a showing to the Board that those materials are necessary in a particular case. This would ensure that the substantial burden of discovery is only imposed to the extent the information is necessary to fulfill the Board's regulatory objectives.

BOARD PROCEDURES AND FILING REQUIREMENTS

A. Sanctions

Norfolk Southern supports the AAR's proposal to amend its regulations to make clear its power to issue sanctions in conformance with Rule 11 of the Federal Rules of Civil Procedure. The Board has suggested in the past that it is guided by the principles of Rule 11. In STB Docket No. AB-290 (Sub-No. 293X), the Board noted that its "Rules of Practice direct 'all persons appearing in proceedings before it to conform, as nearly as possible, to the standards of ethical conduct required of practice before the courts of the United States.'"¹¹ The Board then indicated that "[b]y presenting a pleading to a federal court (and by extension, to the Board), 'an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,' the document 'is not being presented for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.'"¹² Thus, although the Board is already guided by the principles of Rule 11, the Board should formalize its power to issue sanctions, in conformance with Rule 11, by amending 49 C.F.R. § 1104.4.¹³

¹¹ *Norfolk Southern Ry. Co.—Abandonment Exemption—In Norfolk and Virginia Beach, VA*, STB Docket No. AB-290 (Sub-No. 293X) (STB served Nov. 6, 2007) (quoting 49 C.F.R. § 1103.11).

¹² *Id.* (citing Fed. R. Civ. P. 11(b)(1)).

¹³ See *SF&L Ry., Inc.—Acquisition and Operation Exemption—Toledo, Peoria and Western Ry. Corp. Between La Harpe and Peoria, IL*, STB Finance Docket No. 33995; *Kern W. Schumacher and Morris H. Kulmer—Continuance in Control Exemption—SF&L Ry., Inc.*, STB Finance Docket No. 33996, at 3 (STB served Mar. 15, 2002) ("Courts have upheld the authority of agencies to enact disciplinary rules for professionals who practice before them, despite a lack of express statutory authority, as necessary to protect the integrity of the agencies' processes. Therefore, under appropriate circumstances, the Board may impose sanctions to enforce its orders and ensure an efficient process for those under its jurisdiction." (citation omitted)).

Among other things, this concept is intended to ensure that parties in Board proceedings have sufficient facts to support the accuracy of their statements,¹⁴ do not offer facts contrary to those offered in another forum, and do not omit key information. NS has noticed a growing tendency for some parties to allow their zeal for their position to trump facts. Although Rule 11 sanctions are not typically available for oral statements, NS points to the EP 705 Hearing as showcasing the type of advocacy to which it refers. As discussed by NS previously, customers of both BNSF and NS claimed during that hearing that the railroads offer “take-it-or-leave-it” pricing.¹⁵ NS spent substantial time and energy responding to these claims with a verified statement detailing the extensive contract negotiations that had taken place with those parties.¹⁶ While these statements from customers might not rise to the level of warranting sanctions in and of themselves, they highlight the growing trend towards taking liberties with the facts. Such misstatements, misrepresentations, or worse, undermine the integrity of the Board’s processes. Other parties must expend substantial resources to correct the record, and these filings may then be cited in other proceedings to stand for false propositions. Accordingly, NS supports the proposal of the AAR that the Board amend its rules to clarify its power to issue sanctions for improper filings before the Board.

¹⁴ See *In re: John M. Nader*, ICC Ex Parte No. 369 (ICC served July 1, 1987) (citing *Quality Molding Co. v. Am. Nat’l Fire Ins. Co.*, 287 F.2d 313 (7th Cir. 1961) (“Attorneys whose names are affixed to briefs filed in this Court have a heavy responsibility to see to it that quotations from the opinion of other courts as well as other statements therein are completely accurate.”) (quotation added)); cf. *Surface Transportation Board Implements “One Party-One Representative” Policy for Service Lists*, STB Press Release No. 97-68 (Aug. 18, 1997) (“[I]n most instances, the signature of an attorney or practitioner (a non-attorney permitted to practice before the Board) acts as a certification of the accuracy and truth of a document’s contents under Section 1104.4 of Title 49, Code of Federal Regulations.”).

¹⁵ See generally *Competition in the Railroad Industry*, EP 705, Supplemental Comments of Norfolk Southern Railway Company, at 10-14 (docketed July 26, 2011).

¹⁶ Verified Statement of Alan H. Shaw, EP 705, Supplemental Comments of Norfolk Southern Railway Company (docketed July 26, 2011).

B. Agricultural Contract Summaries

NS agrees with the AAR's suggestion that the Board should exempt railroads from the requirement of 49 U.S.C. § 10709(d) to file summaries of all agricultural contracts with the Board. The burden associated with these filings far outweighs any potential benefit. As evidence, NS offers the following description of the associated burdens.

In accordance with the Board's specifications, found in 49 C.F.R. § 1313, NS provides the STB with contract summaries, in searchable PDF format, in the form of Exhibits A and B. Completing and filing the required STB forms is a time-consuming, manual process. Whenever a contract or signatureless contract is amended, the STB form for that document must also be amended.

In 2010, NS made approximately 348 of these filings. Similarly, in 2011, NS made approximately 362 of these filings. NS employees spend approximately six hours every week preparing and filing these forms with the STB. NS respectfully submits that the time and money spent on these agricultural contract summaries far outweigh the limited benefit, if any, of these documents and asks that the Board consider whether to exempt the railroads from this onerous process.

TIMEFRAME FOR NEXT RETROSPECTIVE REVIEW

NS concurs with the AAR that it would be appropriate for the Board to conduct its next retrospective review in five years.

Respectfully Submitted,

Christine I. Friedman

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Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

Counsel for Norfolk Southern Railway Company

Dated: January 10, 2012

EXHIBIT A

STB-NS-C-00000

**NORFOLK SOUTHERN RAILWAY COMPANY
AND CONSOLIDATED SUBSIDIARIES**

CONTRACT SUMMARY

ISSUED:

EFFECTIVE:

ISSUED BY

**NORFOLK SOUTHERN CORPORATION
9TH FLOOR
110 FRANKLIN ROAD, S.E.
ROANOKE, VIRGINIA 24042-0041**

CONTRACT SUMMARY STB-NS-C-00000**RULES AND OTHER GOVERNING PROVISIONS**

ITEM	SUBJECT	APPLICATION
10	Carrier Names	Norfolk Southern Railway Company and Consolidated Subsidiaries 110 Franklin Road, S.E., Roanoke, VA 24042
20	Commodity	
30	Shipper	
40	Contract Duration	(I) Application Date: (ii) Termination Date: (iii) Optional Extension: No
50	Origins, Destinations, Transit Points and Other Shipper Facilities	(I) Origin(s): (ii) Destination(s): (iii) Ports(s): NA (iv) Transit point(s): NA Shipper Facility: NA
60	Rail Car Data	(A) Number of Dedicated Cars (i)(A) Available & Owned by Carrier: NA (ii)(A) Available & Leased by Carrier: NA Average Number of Bad Order: NA or (i)(B) Shipper will furnish the rail cars used for the transportation provided under the Contract, and those rail cars will not be leased from the Carrier. or (ii)(B) The Contract is restricted to services that do not entail car supply.
70	Rates and Charges	(i) Base Rates and Charges: NSRQ 5420-series Publication (ii) Escalation: N/A
80	Volume	(I) Movement Type: Single-car/Multiple-car/Unit-train (ii) Minimum and Actual Volume: NA (iii) Volume Breakpoints: NA:
90	Special Features	Rates

EXHIBIT B

STB-NS-C-00000

**NORFOLK SOUTHERN RAILWAY COMPANY
AND CONSOLIDATED SUBSIDIARIES**

CONTRACT SUMMARY

ISSUED:

EFFECTIVE:

ISSUED BY

**NORFOLK SOUTHERN CORPORATION
9TH FLOOR
110 FRANKLIN ROAD, S.E.
ROANOKE, VIRGINIA 24042-0041**

CONTRACT SUMMARY STB-NS-C-00000

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ITEM	SUBJECT	APPLICATION
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20	Commodity	
30	Contract Duration	(i) Application Date: (ii) Termination Date: (iii) Optional Extension:
40	Rail Car Data	(A) Number of Dedicated Cars (i)(A) Available & Owned by Carrier: NA (ii)(A) Available & Leased by Carrier: NA Average Number of Bad order: NA or (i)(B) Shipper will furnish the rail cars used for the transportation provided under the Contract, and those rail cars will not be leased from the Carrier.
50	Special Features	NA Rates